American Equality and Justice

Henry Churchill Semple, S.J.

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DURING the Civil War the historic Arlington estate on the heights across the Potomac from Washington city was sold for taxes and bought in by the United States Government, which used it as a military station and a national cemetery. Some ten years after the sale, Robert E. Lee's son, Custis, appeared in court and claimed the estate as his property inherited through his mother from his grandfather, George Washington Parke Custis, son of Martha Washington and adopted son of George Washington. He alleged that the sale had been invalid, because the owner had offered to pay the taxes through a friend as agent, and the offer had been rejected, because not made by the owner in person. The jury rendered a verdict in his favor against the United States. The case was appealed to the Supreme Court, and the majority of the Justices decreed in favor of Custis Lee.

The time of this trial was the dark reconstruction era from which our memories shrink in horror. The place of the trial was the centre of Federal power. The contested property was a sacred burial ground of soldiers who had died for the Union. The plaintiff in the suit was Custis Lee. He had fought for the "lost cause," and the bloody losses his father had inflicted on the Union armies were fresh in the memory of all. The case is recorded in the United States *Reports* as that of Lee *v.* The United States. It was not the United States Judiciary or Legis-

[1] This pamphlet consists largely of documents gathered by Mr. Hannis Taylor in his treatise on *Due Process of Law and the Equal Protection of the Laws* as enacted by our Constitution and enforced by our courts.

lative but the Executive that was the defendant. The Attorney-General represented the Chief Executive, who was President Ulysses S. Grant, then in the height of his glory because of his victory over Lee. Those circumstances of time, place and persons strongly enhance the glowing majesty in the following words of Mr. Justice Miller speaking for the court:

"The Attorney-General asserts the proposition that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land, and that what is set up by the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States and it is appropriated to lawful public uses.

"*No man in this country is so high that he is above the law.* No officer of the law may set that law at defiance with impunity. All the officers of government from the highest to the lowest are creations of the law and are bound to obey it. It is the *only supreme power* in our system, and every man, who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of this latter class. Shall it be said in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be uncon-

stitutional, that the courts cannot give a remedy when a citizen has been deprived of his property by force, his estate seized and converted to the uses of the Government without lawful authority, *without process of law and without compensation, because the President has ordered it and his officers are in possession?"*

As Mr. Dicey has said: "The words 'administrative law' are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation. This absence from our language of any satisfactory equivalent for the expression *droit administratif,* is significant; the want of a name arises at bottom from our non-recognition of the thing itself. In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are, in truth, unknown. This absence from the institutions of the Union, of anything answering to *droit administratif* arrested the observation of Tocqueville from the first moment when he began his investigations into the character of American democracy. In 1831 he writes to an experienced judge *(magistrat)* Monsieur de Blosseville, to ask both for an explanation of the contrast in this matter between French and American institutions, and also for an authoritative explanation of the general ideas governing the *droit administratif* of his country."

As Mr. Taylor says: "Under the French theory, speaking generally, the ordinary tribunals have no concern with administrative law *(droit administratif)* as applied by administrative courts *(tribunaux administratifs).* For example, if a body of policemen in France, who have broken into a monastery, seized its property and expelled its inmates under an administrative order, are charged with what English lawyers would call trespass

and assault, the policemen would plead as an exemption the government's mandate in the execution of its decrees dissolving certain religious societies. If the right to plead that exemption is questioned before an ordinary tribunal, a 'conflict' arises which cannot be settled by an ordinary judge under what we would call the *law of the land.* In that illustration we have a sharply defined distinction between a thorough government of law as distinguished from a government of functionaries."

We note that Mr. Taylor says above "if a body of policemen *in France.*" Might he not have said, in any civilized country outside of the British Empire or the United States?

Lieber says: "The guaranty of the supremacy of the law leads to a principle which, as far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been in our system of liberty, the natural production of a thorough government of law as contradistinguished from a government of functionaries."

Was this principle of true liberty and equality under the law unknown to Xenophon, or to the ancient Greeks or even to the ancient Persians? We leave our friend Mr. Taylor to judge for himself after he has perused the following passage from the *Cyropaedia,* Book I., Chapter III. The "Attic Bee" puts these sweet words on the lips of Cyrus the Great, a small boy, and of his mother Mandana, in a conversation held in Media, in the presence of Astyages who was King of the Medes, Mandana's father, and Cyrus' grandfather:

"O Mother, I understand justice exactly already. Because my teacher in Persia appointed me judge over others, as being very exact in the knowledge of justice myself. But once I had some stripes given me for not

deciding rightly in a judgment that I gave. The case was this. A bigger boy who had a little coat, stripping a littler boy who had a bigger coat, put on the little boy the coat that was his own, and put on himself the coat that was the little boy's. I, therefore, passing judgment between them, decreed that it was best that each should keep the coat that fitted him best. On this, my teacher gave me a whipping and told me that when I should be made judge of what coat fitted best, I should decide in this way, but when I was to judge whose the coat was, then it must be considered what right possession is, whether he who took a thing by force or he who made or bought it, should have it. And then he told me what was according to law was right, and what was contrary to law was might. He bid me take notice therefore that a judge should give his sentence according to law. So, Mother, I know very exactly what is just in all cases, or if anything is unknown to me, my grandfather here will teach it to me."

"But child," said she, "the same things are not looked on as just by your grandfather here and yonder in Persia. For among the Medes your grandfather has made himself lord and master of all. But among the Persians it is accounted just that all should be equally dealt with. And your father is the first to execute the orders imposed on the whole State and to accept those orders for himself. It is not his own whim but the law that is his rule and measure. How then can you avoid being beaten to death at home when you go back there from your grandfather, trained not in kingly arts but in the arts and manner of tyranny, one of which is to think that power and domination over all is your due?"

Many critics call the *Cyropaedia* not biography but romance, not fact but fiction. But our point is that suprem-

acy of law over functionaries was planted during the fourth century before Christ in the soil of the mind of an Athenian military genius who had been a pupil of Socrates.

The French revolutionary *liberté, égalité* are nebulous. English and American liberty and equality before the law of the land are enforceable by our courts, which can be blind to the high dignity or the low degree of the contestants and weigh out to each what is equal to his rights or dues according to the law of the land.

The germ of this great element of true liberty and equality is seen in the pledges of the King in Magna Charta: "We will not set forth against any freeman, nor send against him, unless by the lawful judgment of his peers and by the law of the land. To no one will we sell, to no one will we refuse or delay right or justice."

We see many developments of this germ in our Declaration of Independence and in various clauses of our Constitution, but especially in the Fifth and Fourteenth Amendments: "Nor shall any person be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

For this true liberty and equality which are thus distinctly defined and are, moreover, enforceable by the courts, America is not indebted to the *doctrinaires* of the French Revolution, but is indebted in great measure to England; and England owes what she has, in great measure, to the so-called Dark Ages and her mediæval

Catholic prelates and barons who wrested it at the point of the sword from the tyrant John at Runnymede in the year 1215.

In this respect the guaranty of liberty and equality is greater in the United States than in France and the other countries of continental Europe, and is at least as great as in the British Empire. But in another vital respect, it is greater here than anywhere else. Neither the Privy Council nor any British court has authority to decree that an act of the Omnipotent Imperial British Parliament is unconstitutional and void. Our courts have authority to decree that an act of a State Legislature signed by a Governor or an act of Congress signed by the President is unconstitutional and void.

This unique American protection against bad laws, the worst kind of tyranny, was a curious but natural development from our history. "Each colony had a legislature with powers limited by the king's charter creating such colony. In colonial times questions arose whether the statutes made by the legislative assemblies were in excess of the powers conferred by the charter. And if the statutes were found to be in excess, they were held to be invalid by the courts, that is to say, in the first instance by the colonial courts, or if the matter was carried to England, by the Privy Council. As a general rule the colonies when they became Sovereign States adopted new constitutions. But the only constitutions of Connecticut until 1818 and of Rhode Island until 1842 were their charters, dating respectively from 1662 and 1663. One of the first cases, if not the very first, in which a legislative enactment of a State was declared unconstitutional and void by a State court, was decided under the charter of Rhode Island. Our Federal Constitution was adopted in 1787. Only in 1803 and in 1810 did the

Federal Supreme Court first put the stamp of nullity respectively on a national and a state law as repugnant to the Federal Constitution."

There is not in the Federal Constitution and there was not, at least originally, in any State Constitution any line or word expressly giving the Federal or State courts authority to declare a legislative enactment unconstitutional and void. This tremendous authority was supposed and assumed and exercised by the judges, and has been called a product of judge-made law.

The decision of the Supreme Court in the year 1819 in the case of Dartmouth College *v.* The State of New Hampshire was a striking example of American justice enforcing the rights of twelve school managers against the arbitrary and tyrannical abuse of power attempted by a Sovereign State. King George III., by the advice of the Provincial Council of New Hampshire, granted a charter creating a corporation consisting of twelve persons by the name of the "Trustees of Dartmouth College," with power to hold and dispose of lands and goods for the use of the college, to fill vacancies in their own body, to appoint or remove officers of the college, etc. These letters patent were to be good and effectual in law against the king and his heirs and successors forever, without further grant or confirmation.

About fifty years afterwards, the Legislature of New Hampshire professing to enlarge, improve and amend this charter, created, by a new charter, a new corporation, under a new name, adding to the twelve original trustees nine others to be appointed by the governor and council of New Hampshire, and subjecting these twenty-one trustees to the power and control of twenty-five overseers to be appointed by the governor and council of New Hampshire. To this new corporation were transferred

all the property, rights, liberties and privileges of the old corporation.

The original twelve trustees refused to consent to this change, and applied in vain to the Superior Court of Appeals of New Hampshire, which held that the act of the Legislature was not repugnant to the Constitution of New Hampshire or to that of the United States. These twelve trustees then appealed to the Supreme Court of the United States, and employed as one of their advocates Mr. Daniel Webster, who made his famous plea which is regarded as a classic not only of eloquence but also of law. In February, 1819, the United States Supreme Court decreed that the act of the New Hampshire Legislature was void as violating the Constitution of the United States in Article I., Section 10, Paragraph 1: "No State shall pass any law impairing the obligation of contracts."

Here there was a contract, namely, an agreement in which a party undertook to do or not to do a particular thing; a contract between the king, representing the public or state, and the twelve trustees of Dartmouth College; a donation of rights by the king as grantor, an acceptance of these rights by the twelve trustees, as grantees. And he who grants rights forever, obligates himself never to take back the right granted. Here there were what are called vested rights, not chances or possibilities or rights but immediate fixed rights of present or future enjoyment. Here there were property rights, rights to administer property for the purpose of education. Here there were vested property rights arising from a contract. If the State of New Hampshire did not entirely take away these rights from one person, the old corporation, and give them to another person, the new corporation, and thus entirely *destroy* the obligation of

the contract; at least it passed a law *impairing,* abridging the obligation of the contract by lessening the powers of the twelve trustees, *impairing* the obligation of the public or state to perform its undertaking not to do this particular thing, namely, not to take back rights which it had granted.

As Mr. Webster demonstrated in his exhaustive argument, the act of the New Hampshire Legislature was contrary to American precedents. Thus North Carolina had created its university and donated lands. The North Carolina Legislature rescinded the donation. But the North Carolina courts decreed that legislative act rescinding the donation to be void. After this decree the North Carolina Legislature itself gracefully confessed and repaired its own sin of injustice by repealing that act.

Likewise in the State of Virginia it had been attempted to take away from the Episcopal Church certain glebe lands alleged to have been donated by the people or the colonial government of Virginia. The matter came before the United States Supreme Court in the case of Terrett *v.* Taylor. The opinion of the court was rendered through the illustrious scholar, Mr. Justice Joseph Story. The following are some of his noble words:

"That the legislature can repeal statutes creating private corporations and by such repeal vest their property exclusively in the State, or dispose of it to such purposes as the State pleases, without consent or the default of the incorporators, we are not prepared to admit. And we think ourselves standing on the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States, and upon the devisions of most respectable tribunals, in resisting such doctrines."

The decision of the Supreme Court on June 1, 1908, in the case of the "The Municipality of Ponce *v.* The Roman Catholic Apostolic Church in Porto Rico" gave a similar equal protection of the laws to Catholics.

After the change of sovereignty from Spain to the United States, the City Council of Ponce recorded two churches and the lots on which they are situated in the inventory of the property of the municipality. The Bishop of San Juan applied to the Supreme Court of Porto Rico, which decreed that those edifices and lots were the property of the Catholic Church and barred all adverse claims of the municipality. The municipality then appealed to the Supreme Court at Washington. One of the clauses of the appeal alleged "that the Roman Catholic Church of Porto Rico has not the legal capacity to sue, for the reason that it is not a judicial person, nor a legal entity, and is without legal incorporation. If it is a corporation or association, we submit to the court that it is necessary for the Roman Catholic Church to allege specifically its incorporation, where incorporated, and by virtue of what authority or law it was incorporated, and if a foreign corporation, show that it has filed its articles of incorporation or association in the proper office of the government in accordance with the laws of Porto Rico."

To this contention the Supreme Court replied in full. We give this reply in part. By the general rule of public law recognized by the United States, whenever political jurisdiction and legislative power are transferred from one nation to another, the laws of the country which is transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. The Spanish civil code in force in Porto Rico at the time of the transfer, con-

tains the following provisions: Article XXXV.—"The following are judicial persons: the corporations and institutions of public interest recognized by law." Article XXXVIII.—"The Church shall be governed in this particular by what has been agreed on by both parties" (Spain and the Holy See in concordats recognizing the right of the Church to acquire and possess property). Article VIII. of the Treaty of Paris between Spain and the United States says: "It is hereby decreed that the relinquishment or cession as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds of provinces, municipalities, public or private establishments, *ecclesiastical* or civic *bodies,* or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded."

No other ecclesiastical body but the Roman Catholic Church existed in the island at the time of the cession. This article of the treaty was manifestly intended to guard Catholic Church property from spoliation or interference by the new master or any of his agents.

Indeed, the suggestion that the Roman Catholic Church is not a legal person entitled to maintain its property rights in the courts, does not deserve serious consideration, when made with reference to an institution which antedates by almost a thousand years any other personality in Europe. The Code of Justinian contains the law of Constantine of the year three hundred and twenty-one to the effect that the Roman Catholic Church was recognized as a legal person with the capacity to acquire property. The United States have always recognized the corporate existence of the Roman Catholic Church as well as the position occupied by the Papacy. It is the

settled law of this court that a dedication to a public or charitable use may exist even where there is no specific corporation to take as grantee. As the court said through Mr. Justice Story in the case of Terrett *v.* Taylor, it makes no difference that a church was a voluntary society clothed with corporate powers.

The fact that the municipality may have furnished some of the funds for building or repairing the church edifices, does not affect the title of the Roman Catholic Church to whom such funds were irrevocably donated.

The above opinion in favor of the Holy Roman Catholic Apostolic Church in Porto Rico was given through Mr. Chief Justice Fuller, the other Justices unanimously concurring, and follows almost verbatim the brief filed by Mr. Frederic R. Coudert of counsel for the Bishop of San Juan.

The French Constitution of 1795 says: "Equality consists in this that the laws which protect or which punish shall be the same for all." But is there a court either in France or Spain or Italy or Austria or the German Empire with authority to say to President, King or Kaiser or to both President, King or Kaiser and his respective National Legislature, I decree that your act is unconstitutional and void, and it violates liberty, equality, justice, and I command you to bow down to the fundamental law of the land and to undo what you have wrongly done? Is there in their system any practical guaranty like ours that the rights of private citizens or of minorities shall be secure against injustice by public functionaries or majorities?

Some have been grossly wronged by Latin republics and therefore dislike all republics, and especially our great government of the people, by the people, for the people, whose continued and growing success has been

the main cause of the almost world-wide demand for democracy. But we beg leave to remind these haters of all republics that we owe no thanks for our Constitution or Supreme Court to Jean Jacques Rousseau. We owe some thanks for our Constitution to principles of liberty and justice preserved by England from the Catholic Middle Ages in the face of the absolutism of the Reformation and the French Revolution. We owe our Supreme Court as a check on the tyranny of legislative assemblies to our own history and traditions and to our own practical wisdom in discovering and preserving this check.

Some who are recent arrivals on our shores have asked whether it is democracy to vest such tremendous powers in nine men holding office for life. It is *American democracy* which thus secures the supremacy of the Constitution, the fundamental law of the land which is a crystallization of the most deliberate will of the whole people ordering fundamental things for the good of the whole people.

Few realize how this efficient security for life, liberty, property and the equal protection of the laws, has operated to attract and hold immigration, capital and labor and to promote our unprecedented wealth and prosperity. We could wish no greater blessing than a Supreme Court like ours to our sister American Republics, or, indeed, to each of our fellow-members in the family of nations. We American Catholics recognize that this security for our Catholic liberties and our Catholic property has been a great cause of our religious progress, and we long for the day when Catholics in all other lands will have a Supreme Court like ours ever ready to protect them, as it has stood ever ready to protect us for over a hundred years.